THE ITALIAN COMPETITION AUTHORITY’S MAIEUTIC ROLE

Michele Ainis

Keywords: Maieutic; Advocacy; Compliance; Fines; “a quo” judge

Abstract: Does the Italian Competition Authority play a «maieutic» role within the legal system? In this article the Author seeks to provide an answer to that question, by focusing on advocacy powers and the effects of antitrust compliance programs. To this end he examines the latest advocacy interventions as well as the Italian Competition Authority’s approach in assessing antitrust compliance programs implemented by undertakings in the most recent cases. Finally, the Author explores whether the Italian Competition Authority may act as an “a quo” judge within the constitutional meaning.

1) MAIEUTICS, HERMENEUTICS, ADVOCACY

In what sense can we talk about a «maieutic» role of the Italian Competition Authority? Maieutics, by definition, is the socratic method based on a pressing dialogue in which the teacher does not impose personal beliefs on pupils, but helps the latter deliver them on their own, from within. Maieutics is the so-called midwives’ art, as Socrates drew inspiration from his mother Phaenarete, who was a midwife, Xanthippe’s mother-in-law. Also the Italian Competition Authority (ICA) is a bit perceived by companies as a mother-in-law: not much likeable and bestowing unrequested advice (and scolding). However, sometimes even mother-in-laws are right; and in any case, it is useful to listen to them, if nothing else to be able to defend oneself from their rudeness.

Indeed, this is the peculiar trait of the Italian Competition Authority’s maieutic role within the Italian legal system, spurring institutions to acquire awareness concerning the benefits of competition on the one hand, and offering precise indications on competition policies adopted by the ICA on the other. Maieutics thus becomes hermeneutics, that is an interpretative activity; actually, an authentic interpretation, similarly to the interpretative laws adopted by parliamentary assemblies. Generally speaking, this aspect is not taken into consideration because observers are concentrated on the ICA’s sanctioning powers. However, that is a mistake: in fact, by observing how the ICA implements its advisory and reporting powers, it is possible to derive forecasts, anticipations and lines of action that precede the actual repressive measures.

Following along this path, there is the concept of advocacy, which includes a wide range of powers and measures aimed at guaranteeing that

1 Member of the Board of the Italian Competition Authority. Gratitude is expressed to Marina Petri, Antonello Schettino and Silvia Silverio for contributing in this study by searching for material and working on its general outline.

DOI: 10.12870/iar-12426
regulations comply with competition principles. Although it is quite difficult to provide an all-inclusive definition, it is possible to adopt the perspective suggested by the International Competition Network’s Advocacy Working Group. According to the latter, advocacy refers to activities carried out by a competition authority aimed at promoting a “competitive environment for economic activities” by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities. Hence, advocacy is a set of non-authoritative administrative activities, to mention the definition used repeatedly by administrative judges.

So what kind of activities are they? Let’s start from regulations, thus from the identification of relevant measures, from the most dated to the most recent ones. In fact, the chronological research already provides a first piece of information: that is, advocacy tools have progressively increased by number and incisiveness. Actually, within the European panorama, the Italian experience almost constitutes an unicum, as it is closer to the Anglo-Saxon experience in terms of competition advocacy tools provided by the legal system. Moreover, it is interesting to observe that even in Countries traditionally provided with advocacy institutions (the United States of America, Australia), a systematisation process has occurred in recent years. Also a structured development of advocacy powers has taken place due to the need to meet the challenges posed at a global level through the spreading of a “competition culture.”

2) CASES IN POINT

a) DE IURE CONDITO OPINIONS

Art. 21 of Law No. 287 of 1990 provides for de iure condito interventions. In other words, the Italian legal system provides the ICA with wide-ranging powers that include the possibility to submit reports to the Parliament and/or Government, as well as local administrations, with the aim to inform whether laws, regulations or general administrative measures are causing an unjustified distortion of competition or of the correct functioning of the market, and suggest adequate solutions capable of granting a better pro-competitive reconciliation.

This provision is very important as it integrates enforcement competences. In fact, it allows to highlight criticalities that sometimes cannot be

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2 Concerning this concept cf., ex multis, FONDERICO, Le segnalazioni dell’Autorità antitrust e la politica della concorrenza, in Giornale di Diritto Amministrativo, 2009, from page 83 on; D’ALBERTI, I poteri di advocacy delle Autorità di concorrenza in prospettiva comparata, in Concorrenza Mercati, 2013, from page 872 on.


5 D’ALBERTI, I poteri di advocacy delle autorità di concorrenza in prospettiva comparata, cited, from page 871 on.

adequately faced, despite their relevance for the correct functioning of the market. A recent case: a transaction involving Ferrovie del Sud Est (controlled by the Ministry of Transport) and Ferrovie dello Stato (controlled by the Ministry of Finance). In short: the transaction (transfer of FSE to FSI) could not be prohibited on the basis of laws regulating mergers (mere substitution of an operator with another one; therefore, absence of criticalities); nonetheless, the events that preceded the operation (i.e. absence of adequate public notice and potential advantages granted to FSE/FSI, with measures liable to constitute State aids) were such to rise competitive concerns. The ICA decided not to launch preliminary investigations into the FSE/FSI merger (C12067, November 2016) and to report (AS1309, October 2016) said concerns to the public subjects involved (Presidency of the Council and Ministry of Transport).

Another relevant case (AS1178): the ICA submitted a report (February 2015) to ANCI, the Permanent State-Regions Conference, Regions and autonomous Provinces of Trento and Bolzano concerning the many regional/municipal regulations imposing considerable restrictions on opening and/or closing hours of fuel distributors, setting maximum and minimum working hours and mandatory shifts. The ICA highlighted that said measures failed to meet liberalisation as mentioned under d.l. 1/2012 and constituted a restriction on the supply of fuel distribution services. In fact, they reduced operators’ possibility to differ their offer from those of competitors and, therefore, should have been limited to the minimum indispensible (principle of proportionality); also because the public interest to grant the community’s possibility to refuel is assured by laws regulating self-service. The mentioned report is relevant as it proves that the ICA can lever on considerations expressed in interventions ex art. 21 for the implementation of art. 21 bis. In fact, the latter occurred, to mention another example, with the reasoned opinion ex art. 21 bis of 14 September 2016 issued to the Region of Sicily (AS1311), with the aim to prohibit limitations on opening hours of self-service fuel distributors similarly to the prohibitions expressed in the abovementioned intervention (and in this case the Region complied with the ICA’s observations).

Further sources on which to base reports are given by fact-finding inquiries. Among the most recent cases, the report AS1293 of 10 August 2016 concerning urban waste management, addressed to the Region of Abruzzo and 4 municipalities. Specifically, the Italian Competition Authority indicated the need to make immediately operative the governmental bodies involved in ATO (Ambito Territoriale Ottimale – Optimal Territorial Scope), and to comply with the in-house requirements on waste, thus implementing the outcomes of the urban waste fact-finding inquiry carried out on 10 February 2016.

The main Anglo-Saxon legal systems (USA, Australia, UK, Ireland) provide for analogous institutions, in an informal and more widespread manner. In particular, the advocacy experience in the United States began in the mid-Seventies with a series of actions aimed at enabling the Federal Trade Commission (FTC) to implement regulations at a better level. The
FTC intervenes upon the request of governmental offices or other organizations through *amicus* briefs or advocacy letters in cases in which policies affect competition or consumer protection. Moreover, companies and consumer associations can submit requests for the FTC’s approval of merger remedies, and ask for the launching of investigations or the review of influential decisions. Furthermore, advocacy powers in the U.S.A., implemented through opinions and reports, are carried out also by the Department of Justice.7

The Australian’s experience is culturally close to the U.S.A.’s. In fact, the Australian Competition and Consumer Commission (ACCC) issues a series of recommendations characterised by various levels of restrictions destined to bodies in charge of forming the community’s will concerning a specific act. Moreover, particular importance is given to ACCC’s relationship with the media: in the view of cultural diffusion, the Australian Authority involves the public opinion in decisions concerning economic regulations.8 In Europe, instead, the British and Irish experiences are noteworthy.9 In the Spanish and French legal system this institution is similar to the so-called “opinions given by the Authority autonomously.”10

**B) De iure condendo opinions**

*De iure condendo* opinions are regulated by art. 22 of Law No. 287 of 1990, which provides for the possibility to intervene - autonomously or upon the request of qualified third parties - in ongoing regulatory initiatives, with the aim to contribute in forming the subject’s regulatory will. In fact, art. 22 integrates art. 21 both at subjective and objective level, as it identifies a greater range of addressess/applicants and wider margins of intervention (as inferable by the phrases “administrations and public bodies involved” and “issues concerning competition and market”).

Art. 22 allows the ICA to play an important role also in the constant adaptation of the internal legal system to that of the EU, since it can formulate observations during the adoption phase of European laws. It is worth mentioning the opinion of 1 June 2016 on the adoption of Directive 2014/26/EU (AS1281) concerning the collective management of copyright and related rights. The Italian Competition Authority found that both the value and ratio of the EU regulation were compromised by art. 180 of Law 633/1941 (Law on Copyright), according to which one single subject (SIAE) can carry out


9 With reference to said experiences, and in particular the Irish Authority’s role in the case of taxis in Dublin, refer to MURPHY, *Recent developments in Irish Competition law*, in German-Irish Lawyers and Business Associations – Annual Conference, Dublin, 2009.

10 The relevant regulation in the French text is as follows: “Sans qu'elle ait besoin d'être saisie, l'Autorité de la concurrence dispose de la faculté de rendre des avis de sa propre initiative sur toute question de concurrence et d'émettre des recommandations générales sur un marché ou un secteur particulier.”
copyright intermediation. This regime, in the ICA’s opinion, was in contrast with the aim to make copyright holders free to choose among a plurality of operators capable of competing with the incumbent without discriminations.

Another aspect worth mentioning is the ICA’s constant collaboration with the Ministry of Economy with reference to the preliminary screening of calls for tenders organised by Consip. In fact, upon the Ministry’s request, the ICA identifies potential competitive restrictions so as to take due countermeasures.

Another relevant case: AS1222, November 2015. This opinion, submitted to the Ministry of Interior in September 2015, concerned the applicability of Law No. 21/1992 (framework act for the transportation of people with non-regular public bus service) and of fines provided for by articles 85 and 86, of the Highway Code, to digital platforms (applications) connecting the demand and supply of mobility services. The ICA highlighted, first of all, that said platforms have caused complex issues in many EU Countries, among which Italy, due to the interference between their activity and the traditional taxi and chauffeur services. In particular, taxi drivers associations submitted complaints concerning unfair competition carried out by the Uberpop application, which connects passengers with drivers lacking licence or authorization. Hence, the ICA’s recommendation was to adopt a minimum set of rules and regulations for this type of services, so as to guarantee competition, road safety and passengers’ safety all at the same time; this also by defining a “third kind” of non-regular mobility suppliers (in addition to taxis and chauffeurs), that is on-line platforms, which connect passengers with non-professional drivers. According to the ICA, it would be sufficient to provide for the registration of the existing platforms and to identify a series of requirements and obligations for drivers. Among the negative aspects of the regulation, the ICA considered inapplicable the obligations established by Law No. 21/1992, deeming that a digital platform connecting demand and supply of chauffeur services via smartphone cannot comply with a regulation that obliges drivers to accept the service from the deposit and to return to the deposit at the end of the ride.

A similar matter is pending before the Court of Justice: case C-434/15, based on a preliminary committal request submitted by a Trading Judge in Barcelona on 16 July 2015 in a litigation between a taxi driver association and company Uber Spain regarding the qualification of the so-called UberPop service. The issue concerns the nature of the activity carried out by this type of platform: that is, whether said activity is to be considered simply a transportation service (giving rise to the matter of interference with the traditional services offered under the regime of public service obligations and/or obligations subject to access control), electronic intermediation service or information service. The hearing took place on 29 November 2016.

To conclude, a couple of profiles of comparative law. As mentioned, the main Western legal systems are provided with institutions assimilable to opinions and reports as mentioned under articles 21 and 22 of Law No. 287. In particular, the French legal system makes an important distinction among: autonomous opinions and reports; mandatory opinions provided upon the request of
governmental bodies, in the strict cases provided for by law and the commercial code (for example, tariff regulations with reference to professional orders); optional opinions provided upon request submitted by governmental bodies, the Parliament, local jurisdictions, professional or consumer organisations. As regards the United Kingdom, the Competition Advocacy Team was established in 2005. Its main functions can be summarised as follows: it issues opinions on the competitiveness of the legislation through Impact Assessments; it submits informal reports (that is, not published) on ad hoc matters to the relevant governmental departments; it carries out specific wide range projects and studies on the competitiveness of governmental plans (for example as regards contracts, waste management, environmental sustainability); it spreads “competition awareness” at executive level (including the organisation of intra-governmental “Competition Forums”); it processes market studies in sensitive sectors (for example, energy supply). Lastly, in Ireland the Competition Authority carries out a monitoring activity to guarantee that State bodies take into consideration the competitive implications of the regulations adopted.

C) BINDING OPINIONS

Art. 21 bis, introduced in 2011 by the Monti government (through the decree «Salva Italia» n. 201 of 2011) transformed the range of advocacy powers at the very root. In fact, in this case opinions are loaded guns: if the public administration does not comply, the opinion can change into an act of impugnation. Therefore, it is a sensational power that allows the ICA to be constitutive (although with the administrative judge’s mediation) intervening in the genetic dynamics of the regulation, in order to avoid for competition to be exceedingly sacrificed. Moreover, it is a quite original institution: in fact, common law regimes do not provide for anything similar, while the Continental European systems mention the wording “mandatory opinions” that could fall within the scope of art. 21 bis, although the Spanish and French legislators trace profiles of impugnability.

Art. 21 bis strengthens administrative collaboration and gives the Italian Competition Authority more incisive powers, which is positive at least for two reasons: on the one hand, in fact, standard procedures show that the other institutions tend to be more willing to comply with the ICA’s observations when the interventions involved have not been adopted yet, also because said observations often originate from their requests. On the other hand, this power of the ICA’s compensates the possible lack of interest of the addressees of administrative acts, as they are considered anticompetitive to be impugned. In fact, it can occur that reports ex art. 21 remain simply a dead letter since they are not used not even in support of possible litigations for the acts to which they refer.

However, this competence immediately triggered a quantity of doubts and contrasts, also for the laconism of the regulatory
The debate even questioned the constitutional legitimacy of art. 21 bis, until the Constitutional Court intervened, with a ruling dated 2013. The matter had as object the compatibility of art. 21 bis with article 117, 6th paragraph, and article 118, 1st and 2nd paragraph, of the Constitution. Indeed, the procedural legitimation as mentioned under Law n. 287/1990 seems to introduce a new and generalised control of legitimacy on acts adopted by public bodies, in contrast with constitutional provisions. However, the Court specified that art. 21 bis does not imply a “generalised” control, as the acts of impugnation held by the ICA have a well defined perimeter: that is, only administrative acts that infringe competition protection laws, a scope of action reserved to state competence ex art. 117, 2nd paragraph, letter e), Const. However, there are other matters to analyse.

First of all: what is meant by «laws for competition and market protection», the infringement of which constituting the condition for the ICA’s intervention? In this context, between a restrictive interpretation (referred to the sole regulations as mentioned under law n. 287 specifically set to limit restrictive agreements, mergers and abuses) and an extensive interpretation (protecting the useful effect of the implementation of the law), the latter was preferred: falling within art. 21 bis are all the laws that have the exclusive or concurrent aim to favour competition and the opening of the market (thus including national and EU liberalisation measures such as, for example, fundamental liberties recognised by the TFEU or legislative interventions aimed at removing unjustified restrictions on business activities or even measures aimed at ensuring the attribution of public resources with competitive modalities).

On the other hand, the concept of competition is characterised by «a complex content, since it includes not only the set of antitrust measures, but also liberalisation actions, that aim at ensuring and promoting competition ‘in the market’ and ‘for the market,’ according to developments consolidated by now in the European and international legal system» (cf. Constitutional Court, ruling No. 230 of 31 July 2013). Even in jurisprudence it seems by now

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12 Const. Court, 14 February 2013, No. 20.

13 Cf., ex multis, TAR of Lazio, 13 June 2016, No. 6755.

14 SCHETTINO, La tutela effettiva della concorrenza nell’azione pubblica: il potenziamento dell’attività di advocacy, in Diritto dell’Unione Europea, No. 3/2014, from page 528 on.
consolidated that competition evokes both the concept of protection and of promotion. However, protection includes static (or conservative) interventions aimed at preserving the competitive structure of the markets through inhibitory measures or sanctions; whereas, promotion indicates dynamic (or promotional) interventions aimed at liberalising the markets and/or favouring the establishment of competitive structures through conformative measures.

Moreover, it is necessary to highlight how the actual concept of “law” seems to have been overcome in favour of the concept of “principle” or “value.” In fact, the ICA used art. 21bis to contest the legitimacy of measures that put at risk the “principle of competition,” regardless of the existence of a specifically violated law. Even the Council of State lingered over the issue highlighting the “particular relevance of the public interest at stake,” while the TAR of Lazio used the wording “primacy of the protection of competition freedom.” However, it would be wrong to interpret these elements as a higher position of competition compared to other principles of our legal system: rather, it is of a (widespread) interest structurally week and therefore protected through the extension of the subjective base of possible claimants.

Secondly: what value is attributed to the ICA’s preventive opinion? The Council of State, in ruling No. 2246/2014, specified that the ascertainment of the infringement «surpasses the specific interest of the single operator of the market and is therefore taken away from the free availability of the party involved». Therefore, it is an exception with reference to the principle of the availability of interest. Actually, the ICA’s legitimization is similar to that of private parties interested in impugning administrative acts: «in this case, the Authority does not benefit from particular powers of supremacy with reference to the addressee of the opinion». In turn, the Constitutional Court, in ruling No. 20/2013, had the possibility to specify the “advisory quality” of the opinion, which is set in a “first phase” of the proceedings as mentioned under art. 21bis. Hence, the conclusion that appears to be preferable: the ICA’s opinion takes on the characteristics of a warning, similar to what regulates relationships among private subjects, whose main effect is to make mandatory the execution of the self-protection power of the administration involved, obliging it, pursuant to the “motivated opinion” as mentioned under art. 21bis, to comply with the ICA’s

16 Ibid., p. 292.
18 TAR of Lazio, 2013, No. 2720.
19 Cf. CLARICH, I poteri di impugnativa dell’AGCM ai sensi del nuovo art. 21 bis della l. m. 287/1990, in Concorrenza e Mercato, 2013, from page 865 on.
20 Council of State, 323/2016.
indications.21 On the other hand, from a theoretical viewpoint, the element of restrictiveness introduced does not modify the nature of the measure from advocacy power to law enforcement. Although qualified by the characteristic of persuasion rather than coercion, advocacy finds its distinctive trait in the need to affect the regulatory activity, regardless of a real and actual interest. Moreover, this function is not affected by the envisagement of an obligation for the cognizant public body, addressee of the opinion, to carry out self-protection.

Thirdly: the terms of the proceedings. When does the 60 day term start for the Italian Competition Authority to issue its motivated opinion? From the publication of the anticompetitive administrative act or from the ICA’s actual awareness? The Council of State (ruling 1171/2015) settled for the second solution; while the ICA, prudentially, prefers referring to the first. It is clear that these two alternatives are based on two different values: that of the certainty of the law, in the first case (because the publication date indicates an objective term and is objectively computable); that of competition, in the second case (because, lacking prompt reports, the ICA might not notice anticompetitive administrative acts issued by local administrations, or however it might notice them only after a certain period of time, as often occurs). However, there could be cases in which the relevance of the matter leads to follow a solution indicated by the Council of State.

As regards the nature of the 60 day term for the ICA to issue a motivated opinion, as well as the 30 day term for the following appeal to the TAR, the specialist literature highlights that, in both cases, the terms are peremptory (likewise, TAR of Veneto, ruling No. 737/2015). In any case, the Italian Competition Authority takes into consideration a possible answer of the administration after the 60th day from the communication of the opinion, for the purposes of the appeal, but it does not allow the dies a quo to be postponed (Council of State, No. 323/2016). Moreover, as regards procedural terms, holiday suspension is applied from 1st to 31st August.

Fourthly: what are the scopes of the appeal? The latter takes on the double nature of introductive act of the judgement, as well as conclusive act of the administrative proceedings. Consequently, if the act issued initially for the infringement of competition laws is object of the impugnment, the motivations of the appeal will have to have as object the errors indicated in the motivated opinion (the only motives admitted are those added in virtue of the “sure connections” with those initially proposed).23

21 In the same sense MATTARELLA, I ricorsi dell'Autorità antitrust al giudice amministrativo, in Giornale di Diritto Amministrativo, No. 3/2016, p. 294.

22 Moreover, as specified in many ambits by the administrative law, the introduction of compulsoriness does not modify the description of the public administration’compliance with the ICA’s opinion of self-protection, although the latter is often accompanied by voluntariness.

23 As regards the structure of the proceedings cf. the Council of State’s ruling No. 2246/2014, mentioned various times.
Moreover, in the appeal the ICA must keep into consideration the acts possibly carried out by the public administration (contesting, if necessary, the adequacy).

An example for all: the motivated opinion AS1239 (October 2015) highlighted that certain measures of Regulation No. 8 of 7 August 2015 (“Nuova disciplina delle strutture ricettive extralberghiere” – “New regulations for non-hotel accommodation structures”), adopted by the Region of Lazio, limited the access to non-hotel accommodation activity and made its execution more difficult, without actual needs of general interest. Specifically, they: a) imposed on Holiday Houses and B&Bs managed in non-entrepreneurial form periods of mandatory closing (100 and 120/90 days); b) allowed Municipalities to impose specific closing periods to the sole non-entrepreneurial structures on the basis of evaluations connected to economic needs; c) gave to Roma Capitale the authority to identify areas in its territory to destine to the opening of accommodations, so as to avoid an excessive concentration of structures in specific urban areas; d) imposed on holiday houses rental contracts with a minimum duration not inferior to 3 days; e) imposed restrictions on the structures’ size in terms of mandatory minimum metres of certain spaces, imposing onerous and sometimes materially impossible adjustment obligations also with reference to existing structures. The ICA, not deeming the answers provided by the Region of Lazio sufficient, lodged an appeal, due to the contrast of said measures with laws regulating access/supply of services (d.lgs No. 59/2010, implementing the so-called Direttiva Servizi; d.l. No. 138/2011; d.l. No. 201/2011) as well as with the principles of free competition, equal treatment and non-discrimination. The TAR of Lazio upheld the appeal, deeming the restrictions reported by the ICA unjustified and discriminatory, since they were not supported by imperative motivations of general interest (ruling No. 6755, 13 June 2016).

This experience highlights the awareness acquired concerning the fact that for rules of economic activities to be legitimate, they must be rationally justified; and their rationality is to be assessed in primis considering the incidence on the correct functioning of the market. Taking into consideration that the balance among opposed general interests falls within the discretionary power of the political decision-maker, it is also true that it is not sufficient to invoke a general interest (for example, health protection) to justify restrictions, as they can be admitted only if strictly necessary and proportionate to the aim pursued. The convergence of the ICA’s and administrative judges’ evaluations constitutes a positive datum and opens new indications in the fight against unjustifiably distortive regulations.

To this regard, the comparison with the EU infringement procedure (articles 258-260 of TFEU) is of interest. In fact, art. 21 bis is very similar, not only due to its double-phase nature (pre-litigation and litigation), but also due to the purposes and modalities of the intervention. The intervention ex 21 bis aims at assuring, at national level, compliance with the rules regulating market and competition protection which, as known, have EU roots. Often a balancing is carried out in the infringement procedure: on the one hand, the values underpinning precompetitive regulations;
on the other hand, public needs pursued each time by the administration (safety, order and public health standards, etc). The keystone is always the proportionality test, necessary to verify if competitive restriction is strictly necessary and proportionate to the public interest pursued. Indeed, as mentioned, the political choice concerning balancing is up to the administrations, in the rigorous observance of the principle of proportionality; but the ICA’s role (alike the Commission’s) is to make criticalities emerge, highlighting the justifiability of the public determination on the basis of purely technical evaluations.

Lastly, art. 21 bis was extended and strengthened through d. lgs. No. 175 of 2016. This decree, in fact, regulates the holding of public participations, limiting them to those within companies that carry out one (or more) of the following activities: services of general interest (even economic); planning, realisation and management of public works, commission services, enhancement of real estate patrimony, management of exhibition areas, university spin-offs (art. 4). Specific motivation charges are envisaged for the establishment of new companies, as well as the purchase of participations (even indirect) or increases of capital in companies already participated (art. 5). The administration must motivate the ‘need’ of the participation (or of its increase) for pursuing institutional aims, highlighting: financial sustainability; the advantage concerning the “possibility of an alternative destination” of resources; the advantage concerning the “direct or externalised management of the service appointed;” compatibility with the principles of efficiency, effectiveness, inexpensiveness of the administrative action; lastly, compatibility of the financial intervention with EU regulations (including State aids).

The deliberative acts with which administrations realise said operations must be sent to the ICA, which can implement art. 21 bis. Therefore, it has an ex post power of intervention on every type of public investment in venture capital, with the exclusion of listed companies. The decree will entail for the ICA the possibility to monitor a good part of the purchase and/or aggregation acts realised especially at local level. In a competitive view, the new law could allow the ICA to know the structures of the local markets and the changes of ownership structures, overcoming the deficit of information (and intervention?) caused by the non-notification of the operations that do not meet the current thresholds of l. No. 287/90. Moreover, it seems that the ICA’s intervention is prospective, since, on the one hand, the decree appoints the Ministry of Economy with the responsibility to control its correct implementation; and, on the other hand, art. 21 bis does not establish any obligation for the ICA to intervene.

Therefore, what type of control is the ICA to supposed to carry out? According to a first literal interpretation, the censure on the intervention could be obtainable from art. 5,

24 PATRONI GRIFFI, La motivazione degli investimenti nel capitale di società di capitali dopo il TUS sulle società partecipate pubbliche, at www.dirittoeiservizipubblici.it, 27 October 2016.
paragraphs 1 and 2. However, a similar interpretation could rise enforcing criticalities, since the ICA has no competence to express itself on many of the profiles indicated by the regulation. Also for this reason, the deliberative acts must be transmitted at the same time to the State Auditors Department (which carries out an ex post control on the deliberative act as well). According to another interpretation, only the rules with clear competitive content can be censured. By way of example: non-compliance with the limits of purpose and activity provided for by art. 4, the infringement of State Aids regulations; the economic advantage of the deliberative act evaluated in a competitive view; non-compliance with the conditions for establishing public-private companies (art. 17). This interpretation does not widen the ICA’s control and results consistent with art. 21 bis, which requires the infringement of a competition protection law. Whereas, to judge the inexpensiveness of the decision is more complicated. In a competitive view, it requires a comparative assessment of the supply conditions on the market involved by the deliberative act. This can result less problematic with reference to the self-production of goods and instrumental services already offered by operators on the market, whose supply conditions can be valid as benchmarks. Instead, this evaluation appears more difficult when it involves the choice to produce a service of general interest or to realise a public work, with reference to which the requirement concerning the “need to pursue institutional purposes” is a concept difficult to appreciate, implying also political evaluations. Moreover, art. 5 is the measure that explicitly appoints the ICA with the task to identify the existence of a State aid. However, to say the truth, art. 21 bis has already been used to censure non-compliance with State aid laws (with reference to the compensations of the services of general economic interest: AS997-Regione Campania, 6 December 2012, and AS961-Roma Capitale, 13 July 2012). The new law appears significant from a systematic viewpoint. Apart from corroborating the general lines followed by the ICA in the mentioned cases, it seems to follow the part of jurisprudence that has stirred the decentralization of enforcement as regards State aids (with reference to evaluating existence and compatibility, which remains clearly reserved to the Commission). On the other hand, there are analogous experiences in Europe. More precisely, Poland and Cyprus appoint specific competences to the antitrust Authorities as regards State aids: the Polish Authority issues opinions on all the measures.

25 That is: a) analytical motivation on the company’s need to pursue institutional aims; b) non-compliance with restrictions related to purpose and activities provided for by art. 4; c) reasons and aims that justify the choice also at the level of economic modernization and of the financial sustainability and in consideration of the possibility of an alternative destination of the public resources used, as well as the direct or externalised management of the service appointed; d) compatibility of the choice with the principles of efficiency, effectiveness and inexpensiveness of the administrative action; e) compatibility of the financial intervention with TFEU regulations (especially State aids).

26 FIEDZIUK, Towards Decentralization of State Aid Control: The case of Services of General Economic Interest, 2013.
that constitute State aids to evaluate their possible compatibility with the internal market; the Cypriot Authority examines the aids in course of adoption to verify their possible exemption by virtue of EU sectoral regulations.

Lastly, as regards the applicative aspects of the regulation, it seems that the legislator wanted to refer to the need to avoid the super-capitalisation of public companies and the waste of resources. Therefore, the so-called private investor criterion is identified. This is evident also due to the fact that, as mentioned, administrations have to justify the inexpensiveness of the operation. This would mean, therefore, to verify whether a market operator would have had the interest to realise the operation. It is the case to remind that the private investor's criterion finds its origin in the need to avoid that state participation in the public capital may alter competition between public and private enterprises (the Commission adopted a relevant communication in 1984). This criterion was then generalised, becoming an essential condition in the test to be carried out in order to establish whether a public measure constitutes a State aid.

Indeed, the decree seems to refer to State aids in their traditional scope of action, that is to avoid “status” aids (i.e. privileges for public enterprises). The clear aim is also to lever on State aid laws so as to rationalise public expenses and avoid waste: the other aspect of these rules and regulations often forgotten and overshadowed by their pro-competitive value.

Last matter: the impact of ruling No. 251/2016 of the Constitutional Court on the Decree Partecipate, concerning law No. 7 August 2015, No. 124 (the so-called Riforma Madia). From a first analysis, the unconstitutionality of the legge delega does not seem to extend automatically to the implementing measures. In fact, the Court reiterated the need to proceed, should there be the interest, to the autonomous impugnment of the decrees (including the Partecipate Decree) so as “to ascertain the actual infringement of regional competences.” Moreover, the Court observed that the infringement has to be evaluated in the light “of corrective solutions that the Government shall provide in order to ensure the respect of the principle of loyal collaboration.” Therefore, the ruling sounds like a clear invitation to the Government to resort to a corrective/integrative decreeing in the attempt to “review” the decreti delegati and guarantee their “formal quality, and in particular the elimination of constitutional or community illegitimacies as well as technical errors, illogical aspects, contradictions.”

D) PARTIALLY BINDING OPINIONS

In this case, the tool is the annual competition law, made mandatory by art. 47 of law No. 99 of 2009. In abstract terms, it is a useful tool because it keeps the attention constantly focused on the value of competition, and because it allows to clean the system from the anticompetitive laws which were deposited during the solar year. In practical terms, the experience is almost disastrous: the governmental disegno di legge was presented for the first time in 2015, and it is unlikely that it will be approved during the legislature in progress. Moreover, in this first ddl, many of the Italian Competition Authority’s observations went lost or were emptied. Clearly, in this case the same lesson taught by the constitutional reforms is valid: the most
ambitious reforms fail, as shown by the history of three Bicameral and two great reforms first approved in the Parliament (in 2005 and in 2016), but then rejected by voters. Whereas, small interventions, surgical and precise proposals, generate better results, with reference to competition as well as regards to the reform of the Constitution.

In any case, the ddl should, in principle, collect perceptive elements of immediate application, fundamental principles to be given to regions in case of competing matter (ex art. 117, 2nd paragraph, letter e), authorisations for the adoption of regulations, corrective or integrative measures of provisions contained in previous legislative texts. Moreover, the role of the Italian Competition Authority is ever more relevant since the Report accompanying the disegno di legge must also provide the main (and motivated) indications of reports and opinions ex art. 21 and art.22, l. 287/1990, which it was decided not to continue: hence, the «partially binding» character of the advocacy carried out by the ICA in this case. Doctrinal comments do not lack on the value of this institution, but an analysis of the rules and regulations as regards the practice still needs to be necessarily tested.

e) CONSTITUTIONAL LEGITIMACY OPINIONS

Pursuant to art. 4 of decreto-legge 1/2012, «the Presidency of the Council of Ministers collects the independent authorities’ reports having as object restrictions of competition». The ratio of the law is clear: to persevere the maintenance of liberalisation interventions that find origin in primary laws. In other words, the aim is to avoid that the opening of the market at European and state level can be frustrated at regional level. From the operational viewpoint, the Presidency of the Council asks the ICA to express an opinion on regional laws, so as to identify possible unjustified competition restrictions. In case of criticalities, the ICA expresses an opinion pursuant to art. 22, enabling the government to carry out substitutive powers or to raise the matter before the Constitutional Court. It is important to mention the dialogue carried out with the Italian Constitutional Court which, out of 23 regional laws impugned in the two-year period 2013 – 2015, ruled the unconstitutionality of 11 legislative texts, due to the infringement of the laws protecting competition (4 presented inadmissibility and 2 resolved with the national legislator’s conformation to the ICA’s reports).

It is possible to infer the systematic role played by the trilateral collaboration among the Italian Competition Authority, the Presidency of the

27 For all see FLORA’, La nascita della legge annuale per il mercato e la concorrenza, in Mercato, Concorrenza, Regole, 2009, from page 609 on.; LUPO, La tutela del mercato, della concorrenza e dei consumatori nei processi legislativi. Alcune considerazioni, in Governo dell’economia e diritti fondamentali nell’Unione Europea, Bari, 2010, from page 41 on.

28 ARGENTATI, Autorità antitrust e Corte costituzionale: il dialogo al tempo della crisi, in Mercato, Concorrenza e Regole, n. 1/2015, from page 41 on; SEBASTIO, Gli atti degli enti locali e la disciplina della concorrenza a beneficio dei consumatori, in Giornale di Diritto Amministrativo, 2016, from page 57 on.
Council of Ministers and the Constitutional Court, which, in developing its analysis, often draws on the principles and the *modus operandi* proposed by the ICA. A case for all: the opinion on the law of the Region of Marche No. 22 of 10 September 2014 (titled *Modifiche alla L.R. No. 49 of 23 December 2013: Disposizioni per la formazione del Bilancio annuale 2014 e pluriennale 2014/2016 della Regione. Legge Finanziaria 2014*): the ICA identified as a State aid the granting of € 1,100,000 in favour of the company Aeradoria, manager of the Marche airport under regional control, “for the settlement of fiscal fulfilments.” Therefore, the obligations of prior notification to the EU Commission and of standstill could result infringed (art. 108, paragraphs 1-2, TFEU). On the basis of this opinion, the Presidency of the Council lodged appeal to the Constitutional Court, which confirmed the evaluations expressed by the ICA on the qualification as State aid of art. 1, paragraph 2, of the mentioned regional law (ruling No. 179/2015). According to the Court’s opinion, in fact, the contribution was potentially fit to give an advantage to Aeradoria, which saw its competitiveness increase not due to a rationalisation of costs/revenues, but through the refund of charges deriving from the non-settlement of past fiscal fulfilments in a measure well above the threshold set by the EU Regulation No. 1407/2013 (the so-called de minimis aids: € 200,000 in 3 fiscal years).

F) SECTORAL OPINIONS

Two specific cases are worth mentioning. The first is based on articles 14 and 19 of d.lgs. 259/2003, concerning the Code of electronic communications, on the basis of which the ICA submits opinions to the Ministry with reference to radiofrequencies. To this regard, in the two year period 2014-2015, the ICA issued many standard opinions, that is without competition criticalities (77), as well as 3 articulated opinions. In the latter case, the outcomes were as follows: one negative (S2124, concerning the measure with reference to “Market identification and analysis of wholesale access of high quality in a fixed setting”); one partially positive (S2196, concerning the measure with reference to “Wholesale market supply of the service for terminating vocal calls on single mobile networks”); one positive (S2256, concerning the measure with reference to “Integration of the public consultation as mentioned under resolution No. 238/13/CONS concerning market identification and analysis of services for accessing landline”).

Whereas, in the first six-month period of 2016, 54 standard opinions were issued.

The second case draws on art. 34 of decreto legge 201/2011, considering the ICA’s «mandatory opinion with reference to the principle of proportionality on governmental bills and regulations that introduce restrictions for accessing and carrying out economic activities».

29 ARGENTATI – COCO, Success rates of competition advocacy by Italian competition authority: analysis and perspectives, cited, p. 125.

Also this measure aimed at strengthening the advocacy activity. The legislator seems to have drawn inspiration from the authoritative jurisprudence according to which only a timely intervention, carried out in the initial phase of the legislative or regulatory process, allows the ICA to carry out its role efficiently and to affect in a positive manner the contents of the final act. In fact, the quicker the forming of regulations in which the ICA’s reports are received by the addressees, the more they are useful.

However, the measure did not find application, mainly because of the government’s non-transmission of governmental ddl and regulations that introduce restrictions to accessing and carrying out economic activities. And this despite the ICA in one case (AS1059, 2013) expressly identified the non-sending of a regulation of the kind (D.M. No. 38 of 21 February 2013, Rule regulating the distribution and sale of tobacco products), censuring, at the same time, the unjustified nature of the restrictions introduced (among which, minimum distances among commercial activities) to discourage the consumption of tobacco products (health protection).

G) Reports

Pursuant to art. 23 of the institutive law (No. 287 of 1990), «The Authority submits to the President of the Council of Ministers, within 31 March of every year, a report on the activity carried out the previous year. The President of the Council of Ministers transmits the report to the Parliament within thirty days ». The obligation to submit the annual report is common to all Authorities. It represents the moment of connection with the political bodies. Although it is not a tool for direct control of the ICA’s actions, the public modalities (and the “ritual”) with which the outcome of its activities is described fall within the scope of the representative-democratic circuit to which the Italian Competition Authority is substantially extraneous, due to its independence and autonomy. The report is important also for market operators, since it highlights the initiatives undertaken for the protection and promotion of the market and consumers, besides lines of intervention.

Currently, the annual competition bill has greater relevance - in terms of specific (and “desired”) indications to the legislator - since it indicates more in detail the interventions desirable with reference to each economic sector, in the view of promotion and development. In any case, the respective contents and timing (the proposals follow the annual report) suggest their joint reading, being almost in a cause-effect relationship.


33 CATRICALÀ - TROIANO (by), Codice commentato della concorrenza e del mercato, 2010, from page 1362 on.
H) «PRIVATE» ADVOCACY: COMPLIANCE PROGRAMMES

What does compliance mean? According to Confindustria’s Guidelines of 19 May 2016, it is the set of organisational and procedural structures qualified to avoid illicit conducts and to identify them when they occur, favouring awareness concerning their seriousness.\(^34\) OCSE, already in 2011, had defined compliance activities as “innovative” tools at disposal of competition Authorities to promote the respect of antitrust regulations.\(^35\) Therefore, the policy suggestion was to incentivise companies (especially small and medium-sized enterprises) to be equipped with an antitrust compliance and to be developed and integrated within the scope of a wider function of business compliance. Companies, in fact, as a rule, are already provided with a management and control system aimed at avoiding the infringement of specific laws, such as for example corruption and money laundering, financial information and the well known decreto legislativo No. 231/2001.

It is useful to recall the experience of the so-called Modello 231, as it constitutes a useful basis for debate on the theme here considered. As known, d. lgs No. 231/2001 regulates bodies’ liability for administrative breaches of the law due to crimes. In fact, it establishes that companies can be liable from a criminal viewpoint for certain crimes committed by administrators or employees for personal interest or advantage (for example, crimes related to health protection and safety on the job; crimes against the P.A.; company crimes; reception of stolen goods and money laundering; crimes against the industry and commerce). The Modello 231 is a compliance system that aims at prohibiting or fighting against the mentioned crimes carried out by managers or employees, against a series of benefits, distinguished depending on whether the model is ante factum or post factum: the former exempting the party from criminal liability, the latter identifying extenuating circumstances. Despite companies’ organisational and economic efforts, outcomes are not positive, also due to the approach of the judicial authority, often based on the assumption that the mere infringement represents incontrovertible proof of the ineffectiveness of the model.\(^36\)

At a closer look, although not reaching the level of the organisational standards of Modello 231, company practices show how the antitrust self-assessment is not a totally new practice for enterprises. In particular, on the basis of Reg. (EC) No. 1/2003 (the so-called Regolamento di modernizzazione – Modernisation regulation) and the passing onto a «legal exception» regime, companies are called to self-assess agreements and, more in general, their entrepreneurial initiatives, with the aim to identify restrictive


\(^{36}\) SEVERINO, Le sanzioni antitrust tra diritto amministrativo e diritto penale: la visione del penalista, 27 May 2014, available at www.apertacontrada.it
aspects and exemption applicability pursuant to art. 101, par. 3, TFEU. The same practice is carried out also in case of merger or acquisition operations, when assessing contractual relationships held by the companies involved so as to identify related antitrust risks in terms of agreement invalidity (art. 101, par. 2, TFEU) or compensation actions necessary due to antitrust damage that said relationships might have caused to third parties. Likewise, companies with a dominant position, given their “special responsibility” ex art. 102 TFEU, are clearly called to assess the competitive impact of their strategies on the market with greater accuracy.

However, the debate on antitrust compliance programmes has recently intensified. The attention has been placed on the contents of said programmes and, especially, on their usefulness for the antitrust community (consumers, companies, authorities) and on the need to incentivise their adoption. But how can compliance programmes be strengthened? Perhaps by considering them as extenuating circumstances when establishing fines? And if so, in what measure? And how is the adoption/implementation timing to be identified? Is the reduction of the fine sufficient to incentivise compliance? What are the effects on enforcement? Lastly: what connection is there between compliance programmes and the Italian Competition Authority’s “maieutic role”?

Let’s try to advance answers: said programmes are “alternative prevention” (or «positive») tools to be used together with the sanction, that is the traditional deterrent tool (the so-called «negative» prevention). To this regard, it is interesting to mention what Bobbio wrote at the end of the 1960s, elaborating a functionalistic theory of the law and integrating Kelsen’s structural theory. As known, Bobbio thereby outlined an image of the social State’s juridical phenomenon, according to which laws are no longer considered only a mere coercive system aimed at discouraging and repressing undesirable acts, but also have a «promotional function», encouraging and rewarding the socially desirable through «positive sanctions» and incentives.

In this perspective, compliance tools aim at making sure that companies respect antitrust laws: the dissuasive effect of the antitrust sanction – whose high affliative nature drove both the Court of Strasburg and the Court of Luxemburg to assimilate it to the criminal one - is accompanied by the “educational” or “re-educational” effect of compliance programmes, whose adoption/implementation, under certain conditions, can reduce the antitrust sanction.

If the concept appears clear in abstract terms, its practical application nonetheless requires a series of considerations. First of all, and in


38 BOBBIO, Dalla struttura alla funzione, 1977; ID., Studi per una teoria generale del diritto, 1970.

general terms, compliance programmes are to be incentivised, as they are an important contribution in creating a competition culture. However, the approach chosen in order to do so does not only affect sanction policies, but it can also have an impact on the effectiveness of the enforcement action, especially with reference to cartels. In fact, it is necessary to keep into account possible effects (positive or negative?) on leniency programmes, whose acceptance in Italy is all but satisfactory (7 cases).40

Therefore, having described the matter, it is important to mention the efforts carried out by the ICA to promote compliance with antitrust laws through initiatives aimed at granting a certain level of clarity on the modalities for calculating antitrust sanctions. This also in the conviction that said initiatives can spur increasing deterrence, thus leading companies to exclude the advantage of carrying out antitrust illegal actions. Therefore, if in the beginning the Italian Competition Authority followed the EU Commission’s orientations on sanctions, in 2014 it issued Guidelines for calculating sanctions, by adopting the requirements set forth by the administrative jurisprudence41 and, even prior, by the European jurisprudence.42 Companies have benefitted from said Guidelines in terms of transparency and objectiveness of the decisional process and certainty of the sanction, meant as predictability of the consequences of specific actions in terms of applicable sanctions.43 Indeed, the related primary laws (art. 15 and art. 31 of law No. 287/1990 and art. 11 of law No. 689/1981) do not provide many indications on specific modalities for calculating fines.44

The Guidelines codified positions already consolidated in the EU practice and jurisprudence, however diverging for certain aspects from the European Commission’s orientations as regards sanctions, among which basic percentage of antitrust sanctions makes desirable for the ICA to define guidelines on the quantification of sanctions.”

40 I789, Model Agencies (26 October 2016); I772, The concrete market in Friuli Venezia Giulia (25 March 2015); I733, Maritime agency services (22 February 2012); I722, International Logistics (15 June 2011); I701, Retail sale of cosmetic products (15 December 2010); I700, LPG price for heating Region of Sardinia (24 March 2010); I649, Producers of wooden chipboard panels (17 May 2007).

41 Council of State No. 1794/2009, PLT added services Rome: “the lack of homogeneity of data concerning the

42 EU Court, 6 April 1995, case T-148/89, Trefilunion (§142): «[i]t would be] desirable for companies — in order to able to make fully aware decisions concerning their behaviour — to be provided with detailed information, through any means the Commission may deem opportune, concerning the method used to calculate the amount of the fine, without, to this end, having to submit jurisdictional appeal against the Commission’s decision — which would be in contrast with the principle of healthy administration».

43 GHEZZI - PINI, Le nuove linee guida dell’Autorità garante della concorrenza sulla quantificazione delle sanzioni antitrust: maneggiare con cautela, in Rivista delle Società, No. 6/2015, from page 1196 on.

44 Moreover, it is important to highlight the modality for adopting the Guidelines, first submitted to public consultation and then related observations are adopted by the subjects involved (for example, in the published draft no position was taken on the value and contents of the compliance programmes). With reference to the issue cf. NASCIMBENE – BARDANZELLI, Linee Guida dell’Agenzia sui criteri di quantificazione delle sanzioni antitrust: buona la prima (o quasi), in Mercato Concorrenza Regole, No. 3/2015.
the value of compliance. This on the basis of art. 5 of Reg. (EC) No. 1/2003 which, as reminded in a recent ruling of the EU Court of Justice (28 June 2016, C-450/15, AGCM vs. Italsempione), provides for national Authorities to impose sanctions implementing internal laws.\textsuperscript{45} In fact, it is possible to identify two viewpoints on compliance, at European and national level, depending on whether it is considered an extenuating circumstance.\textsuperscript{46}

Therefore, compliance programmes in the European enforcement do not grant “discounts” on sanctions. This is the European Commission’s most recent approach described in the 2012 Brochure titled “Compliance matters.” The latter highlights how compliance programmes contribute in competition advocacy processes, at least indirectly, in so far as they are fit to develop and spread competition culture. However, “the fundamental reason for which a company should comply with competition rules

\textsuperscript{45} This regulation was even criticised by authorities because considered a source of sanction disparity with reference to antitrust illegal actions of the same nature and seriousness for the market. With reference to the issue, AA.VV, Commentario al regolamento (CE) n. 1/2003 del Consiglio del 16 dicembre 2002, Milan, 2007. The problem was perceived also by the European Commission, which, in the Communication of 9 July 2014 COM(2014)453, Ten Years of Antitrust Enforcement under Regulation 1/2003, without doubting the principle of procedural autonomy of the Member States, invited the latter to search for greater sanction consistency.


– besides the fact of being considered an ethical company – is represented by the entity of costs that non-compliance can entail.” It is also deemed that the existence of control mechanisms within the company for sanction purposes is important, as it can weaken the effectiveness of leniency programmes. This in particular for what concerns cartels, since the best benefit deriving from the abovementioned mechanisms is the possibility to ask for sanction immunity by submitting a self-report.\textsuperscript{47} This orientation was deemed correct by the judges of Luxemburg.\textsuperscript{48} Considering that this is the Commission’s most recent approach, it is important to say that a reduction of the sanction is recognised to companies that carried out a compliance programme after the Commission’s launching of preliminary investigations in 7 decisions adopted during the ten-year period 1982-1992.\textsuperscript{49} One of the companies sanctioned, British Sugar, was then object of another preliminary investigation, at the closing of which the Commission considered the infringement of the compliance programme and the recidivism as aggravating circumstances, imposing a higher sanction than what imposed before (Decision of 14 October 1998).

\textsuperscript{47} Cf. PERA - CECCHINI, La rivoluzione incompiuta: 25 anni di anticorruzione in Italia, Rome, 2015.

\textsuperscript{48} Cf., for example, Court of Justice, 28 June 2005, C-189/02P e a., Dansk Rørindustri e a., §373; Court, 24 March 2011, case T-384/06, IBP, §83.

In Germany, the Bundeskartellamt follows the Commission’s rigorous approach.

Among the systems in which compliance has an extenuating value, it is possible to list:

a) The United Kingdom (in the Communication dated June 2011 there is no distinction between ante and post factum programmes: both fall within the consolidated “four-step risk-based process,” and a reduction of the sanction is envisaged up to 10%);

b) France (the Communication dated February 2012 does not provide for extenuating circumstances for ante factum programmes. However, in the case of an infringement for which leniency is not possible, a reduction of the fine is envisaged if the company proves the termination of the illegal action before inspections/launching of the proceedings. For post factum programmes, instead, a reduction up to 10% is envisaged for those carried out within settlement procedures);

c) Spain (in the Mudanzas Internacionales case, dated 6 September 2016, it was deemed that (i) post factum programmes reflect the company’s will to comply with the antitrust law and, depending on the circumstances, they can be considered extenuating. In the mentioned case, the compliance programme was considered “cosmetic,” as it was meant only to improve the company’s image; indeed, there were no effective means to prevent, avoid and quickly identify antitrust illegal actions; (ii) ante factum compliance programmes do not function as extenuating, especially because the ascertainment of the infringement highlights the malfunctioning (iii) it was not possible to implement analogically art. 31quater, letter d), Criminal Code, according to which a compliance programme adopted before the oral phase of the proceedings can mitigate the juridical person’s liability);

d) the USA (up to 2014, compliance programmes were not considered extenuating circumstances; however, during a speech held in 2014 the new Deputy Assistant of the Attorney General of the Antitrust Division marked a change, showing an opening and outlining the minimum requirements: continuous training, monitoring carried out by a specifically identified subject and establishment of a reporting mechanism).

Indeed, as stated in par. 23 of The ICA’s Guidelines on the modalities for implementing criteria for quantifying administrative fines (Linee guida dell’ICA sulle modalità di applicazione dei criteri di quantificazione delle sanzioni amministrative pecuniarie) (resolution No. 25152 of 22 October 2014): «Extenuating circumstances include, by way of example: (…) the adoption and respect of a specific compliance programme, adequate and in line with the European and national best practices. The mere existence of a compliance programme shall not be considered in itself an extenuating circumstance, lacking the proof of an actual and practical commitment in

50 The 4 steps mentioned are: 1) identification of risks, on the basis of the sector of reference and the operational context (for example cartels, vertical agreements, abuse of dominant position), allowing to customise programmes; 2) evaluation of risks: high (sales personnel, marketing, participants in association meetings), medium (personnel that does not have regular relationships with competitors, communication personnel) or low (back office); 3) mitigation of risks: customised and specific training, policy implementation, ad hoc procedures; 4) verification: periodical re-evaluation of steps 1-3.
complying with what provided for in the programme (for example, the management’s full involvement, indications provided by the personnel responsible for the programme, identification and assessment of risks on the basis of the sector of activity and operational context, organisation of training activities adequate to the company’s economic size, envisagement of incentives for compliance with the programme, as well as disincentives for non-compliance, implementation of monitoring and auditing systems)».

Moreover, pursuant to par. 19 of the Guidelines: «The basic amount of the fine (...) can be reduced to keep into account specific circumstances that (...) mitigate (extenuating circumstances) the liability of the party involved in the infringement, with particular reference to the role carried out by the company in the infringement, the conduct kept during preliminary investigations, as well as actions carried out to eliminate or mitigate the consequences of the infringement and the party’s personality, also in the light of what provided for by article 11 of law No. 689/81».

The sanction can be reduced, pursuant to the following par. 20, up to a maximum of 15% of the basic amount. The burden of proof is up to the company, which has to produce evidence testifying an active and practical approach in implementing internal antitrust best practices and the practical use of tools aimed at making them effective.

The ICA’s approach is clear: in order for the compliance programme to be considered extenuating it cannot only be “cosmetic,” that is generically and merely widespread in the company. Rather, the company must show the actual and practical commitment in complying with what provided for in the programme. Therefore, maximum rigour in evaluating the seriousness, effectiveness and credibility of the company’s efforts to carry out conducts characterised by the utmost “competition fairness” on the market.51

On the basis of the above, in the case 1772 – The concrete market in Friuli Venezia Giulia, the adoption of compliance manuals and programmes after the Communication of the Outcomes of the Preliminary Investigations did not allow the ICA to evaluate the effectiveness of their implementation. Therefore, besides the “no to cosmetics” concept, this case highlights that compliance programmes must be adopted and implemented before the Communication of the Outcomes of the Preliminary Investigations is sent, so as to allow the Italian Competition Authority to provide an adequate evaluation of the actual compliance commitment and implementation effectiveness (resolution confirmed by the Tar of Lazio, No. 4099/2016).

Case 1761 – The market in ancillary technical services follows in the same direction: the compliance programme adopted by Sirti after the launching of the preliminary investigations was not considered extenuating because the company had indicated, in its final brief, only the presence of an Antitrust compliance manual, not produced during the proceedings,

51 ARENA, Linee Guida Confindustria per la compliance antitrust delle imprese, 19 April 2016; PEZZOLI, Fines, Discounts, Compliance Programs and Competition Culture, contribution at the Antitrust Convention “Compliance Programs: status quo and challenges ahead”, Fiesole 26 June 2015.
and several training workshops for employees. Therefore, the ICA reported “the lack of minimum elements for evaluating the effectiveness of the implementation of the compliance programme as well as the actual and practical commitment to comply with what provided for by the programme. Specifically, it is not possible to evaluate the effectiveness of the Measures undertaken by Sirti, described summarily by the company.”

Particularly significant is the case I780 – The concrete market in Veneto, in which the ICA, although recognising the validity of the compliance programmes presented by the companies General Beton Triveneta and De Pra (with a 5% reduction of the sanction), nonetheless excluded the one submitted by SuperBeton, because there was no evidence of its practical implementation. Also in the case I777 – Mortgage rates in the provinces of Bolzano and Trento, the ICA recognised the extenuating circumstance (with a 10% reduction of the sanction). In both these cases (I780 and I777), the antitrust compliance programmes adopted by the companies were accompanied by documents that proved the carrying out of training workshops addressed to employees (I777), top management and all business positions (I780), as well as the carrying out of auditing sessions and meetings aimed at the implementation of the programme (I780). In particular, the programmes presented by the Parties in the case I780 included the involvement of the management, the identification of the personnel responsible for the programme, the organisation of training activities, the envisaging of incentives/disincentives, as well as monitoring and auditing systems.

Furthermore: in the case A480 – Price increase of ASPEN drugs (first case concerning an abuse of dominant position), it was found that “the group Aspen adopted a compliance programme at worldwide level before the launching of the proceedings, then integrated it in May 2015 with refresher training courses, also so as to adapt the programme to the needs of the single countries in which the multinational has its headquarters. Said programme envisaged the involvement of the management, the identification of the personnel responsible for the programme, the organisation of training activities, as well as monitoring and auditing systems. Although the programme was adopted before the launching of preliminary investigations, the fact that is was expanded in May 2015, as well as the peculiarities of the exploitation abuse described, allowed to recognise the extenuating circumstance in line with what provided for by point 23 of the Guidelines. Therefore, Aspen was granted a [5-10]% reduction of the basic amount of the sanction. This case highlights that the ICA keeps into account the peculiarities of the charged infringements and the integrations carried out in pre-existing compliance systems.

Also in the case I789 – Fashion Agencies, the adoption of specific compliance antitrust programmes was taken into consideration. In particular, the association Assem modified its Statute with the aim to avoid the repetition of anticompetitive conducts on behalf of its members, it organised a training course, and it provided an antitrust Code of Conduct, made available to its members. The six agencies, Parties of the proceedings, participated in the
course organised by the association and adopted their own antitrust Code of Conduct. In the light of these actions, and keeping into account the moderate economic dimensions of the mentioned agencies, the ICA deemed that said initiatives were in line with what provided for by point 23 of the Guidelines; consequently, it recognised an extenuating circumstance in the measure of 5%. This case highlights that the ICA can also keep into account the size of the companies involved, when this appears moderate.

The ICA’s rigour in evaluating whether or not to give an extenuating value to compliance programmes implies the relevance also of the following aspects: (a) if a company’s participation in an antitrust infringement involves its top management directly – which instead should be the first in charge of implementing compliance programmes and spreading a competition culture based on respecting rules – it is difficult for the programmes adopted and implemented to be considered extenuating; (b) compliance programmes aimed at teaching methods and techniques for hiding anticompetitive conducts or destroying proof have no relevance whatsoever, including “training activities” on how the personnel should behave during investigations; (c) if the company’s infringement dates back in time, this could mean that the compliance programme was not adequate, that it was not applied correctly or that an important part passed unnoticed. The long-lasting and systematic involvement of a company in antitrust illegal actions makes it difficult to identify, for sanction purposes, an extenuating circumstance in the existence of a compliance programme. In fact, an effective auditing and monitoring system should allow to identify ‘quickly deviations and remedies capable of bringing the infringement to an end.

As mentioned, one of the most debated issues concerning compliance is the distinction between ante factum and post factum compliance programmes. With the exception of the Aspen case (A480) – in which however the company made significant integrations in the pre-existing compliance system and the infringement presented peculiar traits – to date the ICA has considered as extenuating only post factum compliance programmes. Several commentators, however, have highlighted that, despite being good tools, they resolve in a sort of voluntary disclosure in the form of a promise, which is worth una tantum and only for the company involved. Therefore, it would be fundamental to incentivise - for preventive and repressive purposes - the adoption and implementation of ex ante facto compliance programmes recognising the same extenuating value of the ex post facto ones.52

The matter, though, is quite difficult since the relevance of ante factum compliance programmes is to be examined even in the light of its relationship with the effectiveness of clemency programmes. In fact, the ratio of compliance programmes lies in wanting to adapt the company’s conducts to a full sharing of competitive principles. Whereas, the emersion of anticompetitive conducts that had “passed unnoticed” - despite a rigorous and serious

52 GHEZZI, Considerazioni sulla politica sanzionatoria dell’Autorità garante tra dissuasione, clemenza ed educazione, Università Cattolica Sacro Cuore, Milan, 27 May 2016.
implementation of the compliance programme - should lead the company not only to desist from the infringement, but also to report the existence of the infringement to the ICA. Should extenuating circumstances be recognised even in companies that do not “repent” – willingly or for inattention – despite the presence of compliance programmes, there is the risk to “bless” malfunctioning systems, encourage a less effective monitoring and perhaps, discourage leniency programmes.

Furthermore, it is necessary to consider that, regardless of the recognition of a sanction reduction, incentives for ante factum compliance programmes remain however high for companies, since: illicit actions and sanctions are avoided up to 10% of the turnover; companies identify the infringement in which they are involved and submit a self-report in order to obtain immunity or relevant reduction of the sanction; compensation actions are avoided for antitrust damage of competitors and consumers; it is possible to benefit from the legality rating attributed by the ICA.

Indeed, it is important not to forget that economic legality is to be always preserved. Compliance with antitrust laws must fall within companies’ due and expected respect of rules. There is nothing distinctive, and must not be, in complying with rules; it must be “the rule.” Otherwise, awarding mere competitive legality is like saying that all others - that is competitors, suppliers, customers - do not respect the rules. On the other hand, the relevance of antitrust compliance within the scope of companies’ more general compliance agenda is also connected to the level of social stigmatization of antitrust infringements. Only recently, perhaps,

a more decisive ‘social feeling’ has started to set in concerning the fact that antitrust infringements are condemnable and dangerous. However, companies still perceive said infringements less serious from an ethical viewpoint compared to other illegal actions (e.g. corruption, fiscal evasion, violation of measures for health protection and safety on the job).

Before concluding, another matter needs to be mentioned: the recognition of extenuating circumstances for infringements “imputable” to a group of companies. It is well accepted by now, even in the EU jurisprudence, that the parent company is jointly liable – standing the circumstances – with its controlled companies for antitrust infringements carried out by the latter. However, it seems difficult to assume that a compliance programme adopted and implemented only by the parent company can be fit to guarantee a reduction of the sanction. In fact, besides the formal aspects of compliance programmes, what matters is their substantial fitness to guarantee the correspondence between the company’s conducts (meant as single economic entity that operates in the market regardless of its legal organisation) and its compliance with competition rules.

In conclusion, the recognition in the Guidelines of an explicit dignity related to compliance programmes concerning sanctions has allowed an important step forward in the search for a relevant “alternative prevention” tool (so-called positive) to be used with the more traditional deterrence tool (so-called negative) on the basis of a severe sanction policy, thus incentivising the spreading of a more rooted and aware antitrust culture within
companies. In this sense, the advocacy path on which the ICA has set out – first with the adoption of Guidelines on sanctions, and more recently with its applicative experience – is aimed at giving companies a reasonable level of certainty concerning the advantages granted by compliance programmes, as long as said programmes are adopted seriously, and just as seriously implemented.

1) **The Italian Competition Authority as a Quo Judge**

The aim to identify the boundaries of the «a quo judge» dates back in time and is of great topicality, both in the scientific debate and in constitutional jurisprudence. For example, in ruling No. 83/1966, writing party Costantino Mortati acknowledges his right with that of the magistrate, in charge of enforcing real estate collection, ex art. 200 of T.U. No. 645 of 29 January 1958, to appeal to the Court, regardless of the administrative or judicial nature of the collecting procedure. In other terms, the Court states that the two requirements, subjective and objective, that allow to qualify an authority as «jurisdictional» (ex art. 1 of constitutional law No. 1/1948; art. 23 of law No. 87/1953; and art. 1 of the Integrative laws for cases before the Constitutional Court) – thus, legitimised to go to Court incidentally - do not necessarily have to concur, but are rather alternative. Indeed, in the case at hand, although existing the subjective requisite (the magistrate belongs to the ordinary judicial authority), but not the objective one (resolution of controversies, at least in the phase of the executive proceeding concerning the sale of goods distracted), the Court deemed the magistrate’s appeal admissible.

Therefore, on the one hand this ruling opens the path for considering the «jurisdictional authority» also as a body that, despite not belonging to the jurisdiction organisation, is nonetheless appointed, even exceptionally, with judging responsibilities and placed in a super partes position; on the other hand, it gives a «judgement» character to proceedings that, whatever their nature and execution modalities, are carried out in the presence and under the direction of the holder of a jurisdictional office.

This fundamental aspect of ruling No. 83 was drawn on subsequently in the “historic” ruling No. 226/1976, with writing party Vezio Crisafulli, in which the State Auditors Department is recognised as a quo judge during the preventive control. In fact, for the Court "the main public interest of the certainty of the law (threatened by the doubts of constitutionality), together with the other public interest of compliance with the Constitution, prohibits such serious consequences to be drawn from the distinction among the various categories of judgements and proceedings (categories often with uncertain and contested aspects)." Similarly to these criteria, legitimation was recognised concerning the possibility to pose questions on constitutional legitimacy, for example, not only to the judge enforcing real estate collection, but also to the judge of criminal execution, as well as to regional Commissioners for the liquidation of civic uses, to finance officers, to the Commission for appeals regarding patents, to municipal Councils as regards electoral litigations, to harbour Captains.
However, the question is to what point it is possible to broaden interlocutory access; and, in particular, if it is possible to assume the legitimation to appeal to independent administrative Authorities. As known, there are very contrasting opinions on the matter, also made uncertain by a not always homogeneous jurisprudential path.

Therefore, for example, in ruling No. 376/2001 the Constitutional Court applies the “law of the interlocutory ratio” – contained in the Crisafulli ruling – also as regards the matter of constitutionality risen by a private subject, as the board of arbitrators is within the scope of the ritual arbitration. In other words, the Court recognises the arbitrator as a quo judge, thus the power to guarantee the ratio before the interlocutory, that is the submission to one’s own syndacate of laws constitutionally doubtful which, otherwise, would find application in decisive activities.

This logic - which enhances the general interest to eliminate illegitimate laws - is nonetheless disclaimed with ruling No. 254/2004, where the constitutional court considers inadmissible the appeal suggested by the Council of State when issuing the opinio on the extraordinary appeal of the President of the Republic, because relieved by a «non jurisdictional body» and given «the administrative nature of the extraordinary appeal to the President of the Republic». And this despite the Court of Justice already recognised in 1997, the jurisdictional nature of the Council of State during consultation. This interpretative contrast was then resolved by the 2009 legislator that - making the Council of State’s opinion binding in the extraordinary appeal, and therefore the decision contained in the opinion totally definitive - removed the main obstacle to the recognition of the legitimation of said body as a quo judge during the extraordinary recourse (cf. art. 69 of law No. 69/2009). This finds confirmation in the following constitutional jurisprudence (ruling No. 73/2014); anticipated, actually, by the recognition, as a quo judge, of the Council of administrative justice for the Region of Sicily as regards the opinion on the extraordinary appeal to the President of the Region of Sicily (ruling No. 265/2013).

The briefly mentioned rulings highlight several fundamental aspects. Specifically, for a body to be recognised as a quo judge, it is not necessary for it to be grounded in a jurisdictional order, but, rather: a) it needs to be legitimised to decide definitively on the interpretation or application of a law; b) it needs to be in a position of independence and of being a third party; c) it needs to “judge” in cross-examination with the parties involved.

This is where it becomes possible to assume that independent administrative Authorities can be identified as a quibus judges; and perhaps the


54 Court of Justice EC, Section V, 16 October 1997, Garofalo ed altri vs Ministero della Sanità, joined cases from C-69/96 to C-79/96.
solution lies in an intermediate path. If, in general terms, there is no doubt concerning the Authorities’ heterogeneity and the activities which they have been appointed - which do not allow a legitimation to appeal tout court - by now their constitutional and community foundation is likewise undoubted, especially with reference to the Authorities that carry out and develop their activity in crucial sectors of economy and rights, protecting them from the Government’s decisions by definition “partial”; this has led to influential voices to collocate said functions in a grey area between administration and actual jurisdiction.  

Indeed, Crisafulli’s intuition of the interlocutory ratio in the effectiveness and, therefore, the principle of constitutionality, could contribute in identifying “fields” of interlocutory access given to the Authorities “for limited purposes.”  

On the basis of a close analysis, it is possible to state that this already occurs with reference to the Antitrust activity both through its opinions and through the appeal ex art. 21-bis, the ICA, with reference to its profiles of competence, highlights contrasts between laws (legislative or regulatory) and Constitution and, more precisely, between acts or measures that contrast with the constitutional value of competition, as mentioned under art. 117, paragraph 2, letter e), Const.  

Moreover, it is useful to note that the mentioned activity is carried out by the ICA in its function of independent, third-party and impartial body; it is legitimised to decide definitively on the interpretation or implementation of competition laws; and it “judges,” for the profiles of its competence, in cross-examinations with the parties involved. All these characteristics are necessary as regards the guarantee function carried out by independent Authorities.  

In conclusion, shifting the principles mentioned from the constitutional (and community)
jurisprudence to the Italian Competition Authority, time seems mature for its recognition as a quo judge. Indeed, for the “limited purposes” it is appointed by law and, consequently, so as not to subtract, or even delay, the control of the constitutionality of laws in sectors highly sensitive as regards rights and liberties constitutionally granted, which before the ICA are implemented with effects difficult to reverse.

3) ADVOCACY: PRACTICAL OUTCOMES

Advocacy powers are a sort of thermometer of the Italian Competition Authority’s credibility and authoritativeness. They are the result of the principle of loyal collaboration, as repeatedly recalled by the constitutional jurisprudence, at the same time, though, they identify the Authority’s sphere of influence. Moreover, as highlighted by the most recent data concerning the applicative scope, both reports and opinions - as mentioned under articles 21 and 22 - play a relevant role in implementing the enforcement of competition laws, favouring multilevel interactions among subjects involved in the competitive structure of the market.

In this sense, advocacy plays a role at the same time maieutic and paideutic, since it promotes and teaches an integrated competition culture among public bodies. On the other hand, the non-authoritative nature of traditional advocacy powers allows a propulsive dialogue of competition culture among the public administrations involved. The latter, not necessarily having to comply with the ICA’s opinions, establish a constructive exchange, illustrating the reasons for which a specific structure does not constitute (to their opinion) a restriction of competition.

Moreover, the data analysed enable to reach a first conclusion: despite the strengthening of advocacy powers owing to art. 21 bis, and despite the further tools examined supra, articles 21 and 22 continue to play a fundamental role in advocacy powers. This is due to the terms that characterise the procedure of art. 21 bis and the need to select the cases considered more relevant with the aim to make the ICA’s action more effective (considering that the implementation of this tool can entail litigations and, therefore, a greater commitment for the ICA’s resources).

More in particular, out of the 185 cases registered in the two-year period 2014-2015, 150 involved traditional tools; among these, about 70% referred to art. 22. This trend was confirmed in the first semester of 2016: out of a total of 45 interventions, 36 were carried out

61 Cf. CARPAGNANO, The effects of competition advocacy on the pro-competitive regulation of the markets, in Rivista Italiana di Antitrust, No. 1/2016, from page 109 on; REBECCINI, Competition advocacy, the Italian experience, in Rivista Italiana di Antitrust, No. 2/2014, from page 101 on.
62 Data were collected from the ICA’s annual Reports.
ex art. 22; whereas, the interventions ex art. 21 seem to be in decrease (only one case) and the number of those ex art. 21 bis is more or less constant (8 interventions against 19 in 2015). Moreover, it is particularly interesting to highlight how the measures under exam are often used jointly by the ICA, so as to affect the various genetic phases of a single phenomenon (among these, particular attention is given to interventions concerning contracts, opening hours of shops and local public transport).

When taking the analysis to the following level, however, and considering the public administrations’ discretionary power with reference to the implementation of opinions and reports issued by the ICA, it is possible to observe that, in the two-year period 2014-2015, less than 30% of the reports ex art. 21 and a little more than 50% of the opinions as mentioned under art. 22 were complied with by the public body involved. The greater success of interventions ex art. 22 compared to those ex art. 21 seems substantially confirmed in the first semester of 2016, although it is necessary to wait for the data of the second semester to be able to evaluate the outcomes of the mentioned interventions in a more complete way. The sectors mostly involved are transports, energy and various services. With reference to the first two, the ICA reasserts the indications already provided in the recent cognitive investigations.

As regards interventions ex art. 21 bis, in the two year period 2014-2015, these remained numerically more contained compared to interventions ex articles 21-22 (out of the 185 relevant cases in the past two year period, only 29 refer to this regulation); their percentage of success, though, is remarkably higher (about 70% of the cases). This trend has been recently confirmed, although only in part. In fact, comparing 2015 with the first semester of 2016 the number of interventions remained stable (19 in 2015, 8 in the first semester of 2016); whereas, the outcomes, net of litigations, have worsened, passing from 58% of positive outcomes in 2015, to none in the first semester of 2016, which however registers also 3 cases in which the ICA deemed to adhere to the reasoning expressed by the administration answering the motivated opinion. Lastly, local bodies are the main addressees of the appeals ex art. 21 bis, and it is in this scope of action that there is the highest amount of negligence with reference to the findings submitted by the ICA, especially in 2015-2016. As regards the sectors involved, object of the appeal are mainly the transport sector, the large scale distribution and the insurance sector.

Moreover, observing the decisions concerning advocacy in the first years of life of the measure (1990 – 1996), it is clear that the enforcement is all the more effective the more the European Commission intervened at the same time on the issue, leaving open possible matters concerning the actual autonomous effectiveness of advocacy measures in internal regulations.

Cf. ARGENTATI – COCO, Success rates of competition advocacy by Italian competition authority: analysis and perspectives, in Rivista Italiana di Antitrust, No. 1/2016, from page 114 on.
4) PERSPECTIVES

Undoubtedly, the Italian legal system shows a tendency to strengthen the Italian Competition Authority’s advocacy powers. Also the d. lgs providing the Consolidated Act on local public services (another element of the Madia Reform) - approved by the Council of Ministers but (at the date of December 2016) not yet published - seems to be oriented in this sense. Currently the decree appears “frozen” due to the Constitutional Court’s recent ruling on the Madia reform (ruling No. 251/2016). In any case, the ratio of the decree is to grant quality and efficient services to citizens, through competitive appointing modalities, standard costs and at least provincial scopes of action. In this perspective, art. 5 has provided the ICA with the authority to control the modalities for using said services, thus having the powers to act ex art. 21 bis should the local bodies not comply with the criteria and procedures provided for. In other words, another element strengthening its advocacy powers.

This is an aspect to be judged positively, for a series of reasons. First of all, because especially in economic sectors not subjected to regulatory Authorities’ interventions, companies adopt anticompetitive conducts so as to conform to a restrictive regulatory system. In fact, it is not rare to find legislative measures imposing or incentivising the infringement of rules protecting competition and the market. It is just as common to find cases in which the administration delays the realisation of liberalisation processes through determinations that hinder, instead of favouring, the actual opening of the markets, especially the local ones.

Secondly, advocacy represents, in terms of power, an incisive co-action tool for the compliance of obligations deriving from the EU: the ICA’s interventions, in fact, can contribute in the evolution of the administrative system toward a greater consistency with the EU regulations on competition and market.

Thirdly, advocacy can allow to prevent the launching of infringement procedures for the violation of EU rules on market and competition and, consequently, avoid the proposition of possible compensation actions against the State by the offended parties. In fact, the cases within the scope of action of advocacy could give place to censures carried out by the European Commission. If it is true that the launching of an infringement procedure is not limited to the ICA’s initiatives, the Commission could however decide to wait for developments to then evaluate the interest to intervene.

Fourthly, after the abolition of administrative controls on the actions of minor territorial bodies and the reduction of cases of preventive verification of legitimacy of state administrative acts, our legal system is lacking incisive tools to fight against the deficits of legality (also at community level) that affect the public action. And it cannot be expected that private subjects, by means of appeals, will be the «gendarmes» of the legal system: besides being able to miss the specific interest to impugn, sometimes it is difficult to assume the lesion of individual subjective situations.
Lastly, art. 21-bis is a tool complementary to the disimplementation, by the administrative authorities and national judges, of legislative measures in contrast with EU regulations. In fact, the ICA’s possible acts of impugnation will allow to censure, although in a mediated form, legislative measures on the basis of which the administrative measures adopted were deemed restrictive by the ICA. In fact, the latter can ask the administrative judge not only to disimplement said measures, but also to raise the issue of constitutional legitimacy or organise a prejudicial committal.\(^{65}\)

\(^{65}\) Cf. for example the Court of Justice, 4 September 2014, ICA vs. MIT.
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